

# The National Security Archive

The George Washington University  
Gelman Library, Suite 701  
2130 H Street, N.W.  
Washington, D.C. 20037

Phone: 202/994-7000  
Fax: 202/994-7005  
nsarchive@gwu.edu  
www.nsarchive.org

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## VIA FACSIMILE: (202) 225-1991

Hon. Congressman Peter Hoekstra, Chairman  
Permanent Select Committee on Intelligence  
U.S. House of Representatives  
H-405 U.S. Capitol Building  
Washington, D.C. 20515

Hon. Jane Harman, Ranking Member  
Permanent Select Committee on Intelligence  
U.S. House of Representatives  
H-405 U.S. Capitol Building  
Washington, D.C. 20515

Dear Chairman Hoekstra and Ranking Member Harman:

I am the General Counsel of the National Security Archive (Archive), a research institute located at George Washington University, established to promote research and public education on U.S. governmental and national security decision-making. The Archive is a frequent user of the Freedom of Information Act, 5 U.S.C. Sec. 552, and the mandatory declassification review procedures of Executive Order 12958, as amended.

I would like to submit the attached statement for the record of your Committee's May 26, 2006 hearing on the media's role and responsibilities in unauthorized disclosures of classified information.

Respectfully yours,

Meredith Fuchs  
General Counsel

**Statement of Meredith Fuchs, General Counsel, The National Security Archive  
Before the House Permanent Select Committee on Intelligence  
Hearing on the Media's Role and Responsibilities in Leaks of Classified Information  
May 26, 2006**

Last month the Information Security Oversight Office (ISOO) published an audit report that found that historical records that had been publicly available for many years – indeed some of which had been published in government publications – have been reclassified in a secret document review program at the National Archives and Records Administration (NARA). In particular the report found that at least 1 out of 3 of the more than 25,000 previously open records was improperly classified. That means that, over the last 6-7 years, approximately 50,000 pages of 25 to 50-year-old documents have been wrongly marked as secret at NARA. These include, for example, a document that deals with an early CIA program to drop propaganda leaflets into Eastern Europe by hot air balloon. It warns that the weather in the area is a problem because of, among other things, the difficulty of finding the leaflets in snow covered ground. The audit report also found that the classification of the other two-thirds of the records was done without sufficient judgment. For example, 50-year old documents were classified because they contain the names of non-covert CIA personnel on the list of people who received the documents.

These revelations have bolstered a growing public concern about massive improper classification of information. The available statistics certainly demonstrate that classification is on the rise. In 2004, according to reports issued by ISOO, the federal government made 15.6 million classification decisions (up from 8.7 million in 2001). The federal government spent \$8 billion in 2004 (up from \$5.5 billion in 2001) stamping those documents "top secret," "secret" or "confidential." And, that does not include the CIA's budget, because the CIA claims that revelation of its financial outlays would compromise sources and methods of intelligence gathering.

One might assume classification is on the rise because the nation is at war, but officials from throughout the military and intelligence sectors have admitted that much of this classification is unnecessary. Secretary of Defense Donald Rumsfeld last year acknowledged: "I have long believed that too much material is classified across the federal government as a general rule ...."<sup>1</sup> Under repeated questioning from members of Congress at a 2004 hearing, Deputy Secretary of Defense for Counterintelligence and Security Carol A. Haave eventually conceded that approximately 50 percent of classification decisions are unnecessary, overclassifications. These opinions echo that of the former Chair of this Committee, Porter Goss, who told the 9/11 Commission, "There's a lot of gratuitous classification going on, and there are a variety of reasons for [it]."

Former Solicitor General of the United States Erwin Griswold, who led the government's fight for secrecy in the Pentagon Papers case, acknowledged some of the reasons:

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<sup>1</sup> Donald Rumsfeld, *War of the Worlds*, Wall St. J., July 18, 2005, at A12.

It quickly becomes apparent to any person who has considerable experience with classified material that there is massive overclassification and that the principal concern of the classifiers is not with national security, but with governmental embarrassment of one sort or another. There may be some basis for short-term classification while plans are being made, or negotiations are going on, but apart from details of weapons systems, there is very rarely any real risk to current national security from the publication of facts relating to transactions in the past, even the fairly recent past.<sup>2</sup>

It is these sorts of admissions that help explain why there have been so many high-profile, front page leaks about the legitimacy of government policy decisions. As Bill Moyers observed in his book The Secret Government: The Constitution in Crisis (1990): “Secrecy is the freedom zealots dream of: no watchman to check the door, no accountant to check the books, no judge to check the law. The secret government has no constitution. The rules it follows are the rules it makes up.” The perception that there is a significant threat to the legitimacy of government actions can put a citizen’s patriotism at odds with his or her bureaucratic loyalties. Thus, it is no surprise that the story that *The New York Times* reported on December 16, 2005, about warrantless surveillance by the National Security Agency focused on the striking shift in intelligence policy, not on the technology for conducting such surveillance. There is no doubt the reaction to the story shows the importance of public debate on such policy matters, even if the methods of surveillance themselves must be classified.

The excessive secrecy that we see today is unchecked. Even if there were no bureaucratic appeal to being able to use classification as a tool to control information, protect turf, and facilitate preferred policy directions, the fear of being held responsible for causing harm to national security and the existence of penalties for disclosing classified information push decisionmakers to err by a large margin on the side of secrecy. Further complicating the matter, the iron grip on classified information held by the original classifiers, makes it very difficult to declassify historical information that is no longer sensitive.

Original classifiers feel no pressure to limit secrecy. Not even clearly improper classification results in a penalty, despite the fact that it costs large sums of taxpayer money and may often, as ISOO concluded, exacerbate the potential harm to national security. For example, ISOO identified an instance when in 2002 an agency reclassified 134 records from the Eisenhower Presidential Library that had previously been declassified – and that has been available for public review. ISOO concluded that the reclassification was wholly improper because the applicable executive order on classification did not permit any reclassification. There is no legal recourse or penalty for such unauthorized classification. ISOO and NARA have proposed a National Declassification Initiative – such as that recommended in 1997 by the Moynihan – Helms Commission on Secrecy – to help moderate extreme efforts by original classifiers to eternally control their information,

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<sup>2</sup> Erwin N. Griswold, *Secrets Not Worth Keeping: The courts and classified information*, Wash. Post, Feb. 15, 1989, at A25.

but that will only succeed if the agencies are required to participate. And, it only relates to records that are more than 25 years old.

For more current information, it is rare for unnecessary secrecy ever to be exposed. Despite the executive order on classification's admonition that authorized holders of classified information have an affirmative duty to challenge the classification status of information they believe is improperly classified, the number of examples of improper, indeed, often ridiculous, classification decisions that my organization is aware of – such as the intelligence report from 1974 about a possible terrorist attack on Santa Claus or the classified memo from George Tenet to CIA employees after September 11, 2001, which says “There can be no bureaucratic impediments to success. All the rules have changed,” – gives the impression that few government officials have ever acted on this responsibility.<sup>3</sup>

Moreover, methods for challenging the excessive secrecy are extremely limited, even when one knows where the so-called “secrets” are kept. On an individual basis, members of the public can seek mandatory declassification review (MDR) of identifiable records under Executive Order 12958, as amended. With 15.6 million classification decisions in 2004 alone, however, MDR is not a very effective route to stemming overclassification. And, even if a person obtains declassification of a record through a Freedom of Information Act request or MDR, recent experience shows that nothing can stop an agency from reclassifying it. These reclassification efforts suggest that there may be a significant number of currently classified documents that reside in the files of journalists and researchers across the nation. The owners of those files did nothing wrong in collecting the records through FOIA requests and research on the open shelves at NARA, but the shifting nature of what is classified and when leaves them vulnerable to attack for handling classified information.

Congress does have the authority to declassify information, *see* Senate Resolution 400, section 8, agreed to May 19, 1976 (94th Congress, 2nd Session), but it has never openly used that power. Instead, Congress has often experienced the same dismay as the public about excessive secrecy. For instance, when the Senate Select Committee on Intelligence sought to release its report on intelligence concerning Iraqi weapons of mass destruction to the public, Senator Trent Lott reported: “I have been offended by the indignity heaped on the intelligence committee by the C.I.A. with their redactions.”<sup>4</sup>

The overclassification, reclassification, shifting classification, and misclassification make it extremely difficult for private citizens or government officials to know what is classified at any one time. Any law or policy that expands legal jeopardy for private citizens handling classified information could broadly sweep in people who had done nothing blameworthy and become a tool for putting pressure on the exercise of First Amendment rights, even though there may be good reason in many cases to question the legitimacy of the classification itself. It is certainly no easier for a person who faces legal jeopardy for

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<sup>3</sup> See “Dubious Secrets,” edited by Jeffrey Richelson, William Burr, and Thomas Blanton (May 21, 2003), available at <http://www.gwu.edu/%7Eensarchiv/NSAEBB/NSAEBB90/index.htm>.

<sup>4</sup> “Lott Seeks Oversight of Classified Data,” New York Times, July 11, 2004.

receiving or handling classified information to challenge the classification than it is to reduce classification at the front end. Indeed, in criminal prosecutions when classified material is relevant there is a set of procedures designed to make it possible to use the information without causing risk to national security, but there is no challenge procedure in the law for determining if the information does pose a risk to national security. Moreover, any such law would be an enormous shift of power away from the people to the bureaucracy and from Congress to the Executive Branch.